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Supreme Court, U.S.
FILED

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No._____

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

LAWYER WARD,
Petitioner,
v.
HERITAGE MEDIA CORPORATION,
Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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August 12, 2000

33 pp

QUESTION PRESENTED

Whether the judgment of the United States Court of Appeals for the Eighth Circuit in *Ward v. Heritage Media Corporation*, Eighth Circuit Case No. 99-2540, April 14, 2000, is inconsistent with this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, ___U.S.___ , 120 S.Ct. 2097 (2000), that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were Mr. Lawyer Ward, the petitioner, and Heritage Media Corporation, the operator of KXTR-FM, a classical music radio station.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

LAWYER WARD,
Petitioner,

v.

HERITAGE MEDIA CORPORATION,
Respondent.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Mr. Lawyer Ward respectfully petitions the Court for its writ of *certiorari* to review the order and judgment of the United States Court of Appeals for the Eight Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at the Appendix to this Petition and is unpublished. The order of the United States District Court for the Western District of Missouri is unreported and is reproduced in the Appendix.

JURISDICTION

The United States Court of Appeals for the Eight Circuit entered its judgment on April 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Justice Clarence Thomas granted an extension of time until August 12, 2000 (Saturday), to file this petition for *certiorari*. That extension automatically extends to Monday, August 14, by virtue of Supreme Court Rule 30.1.

STATUTORY PROVISIONS INVOLVED

Mr. Ward brought this claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, which prohibits employers from discriminating on the basis of age in employment decisions. Mr. Ward was 57 years old at the time of this case. He was the oldest member of the class that was subject to the crucial employment decision. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000), also concerned the Age Discrimination in Employment Act.

The Age Discrimination in Employment Act "prohibit[s] arbitrary age discrimination in employment" against "individuals who are at least 40 years of age."

STATEMENT OF THE CASE

This case is an age discrimination claim by the petitioner, a 57 year old black man named Lawyer Ward. The action was brought pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq*. Mr.Ward was a salesman for KXTR-FM, the only classical radio station in Kansas City, Missouri, from 1979 until 1997. He was sales manager from 1979 to 1995. He was demoted to "senior account executive" in 1995. Heritage Media Corporation bought KXTR in August, 1996. It considered changing the station's format in the fall of that year. Heritage owned another radio station in Kansas City, KCIY-FM. KCIY had seven sales representatives, and KXTR had five. Heritage decided to combine the two sales staffs in order to cut costs and to retain only ten out of the twelve representatives. All seven from KCIY were retained, leaving three openings for KXTR's five salesmen. The five KXTR sales representatives were Lisa Klinzman, age 31, Billie Reeves, 51, Julie Throne, 26, John Verlin, 39, and the only black man and oldest person in the group, Lawyer Ward, 57. Bill Newman, Sanford Cohen, and Pam Malcy conducted the interviews.

Mr. Newman was the general manager of KXTR, and Ms. Malcy and Mr. Cohen were Heritage sales managers. Prior to the interviews, they read a gossip column in the *Kansas City Star* that quoted Mr. Ward regarding the impending sale of KXTR to Heritage. In the column, Mr. Ward was quoted as saying that he was committed to KXTR's classical music format. Heritage concluded that Mr. Ward would follow the classical music format to another station if Heritage changed to a new format. The evidence is that this was a conclusion drawn by the writer of the column and not an articulation of Mr. Ward actual intentions. Heritage claims that Mr. Ward was a management problem and that he did not follow rules. In the notes from his interview with Mr. Ward, Mr. Newman commented that Mr. Ward "felt he knew more about the operation than the owners and managers. He's an independent operator who won't conform to policy and procedures without a fight." Mr. Newman concluded that Mr. Ward "would not work" because his allegiance, knowledge, and skills were attuned to a classical format.

Ms. Malcy interviewed Mr. Ward and concluded that he was a "free spirit who is not used to reporting to management." Ms.

Malcy also concluded that Mr. Ward showed no willingness to use computer-aided research techniques. Mr. Ward admitted that he had limited experience with computer-aided research techniques, but he told Mr. Newman that he was interested in learning and had not before simply because it had not been made available to him. Mr. Ward was familiar with computer generated reports used by the company, and he owned a personal computer. The interviews asked Mr. Ward "what drove him crazy about current management." In response, he made the elicited critical comments. When Mr. Cohen interviewed Mr. Ward, he noted that Mr. Ward strongly preferred that KXTR continue its classical format. (KXTR, in fact, has continued its classical format to this day.) When the interviews of all five sales representatives from KXTR were completed, Heritage Media Corporation retained Ms. Klinzman, Mr. Reeves, and Mr. Verlin. Heritage ended the careers of Mr. Ward and Ms. Throne. All of the retained KXTR employees were at least six years younger than Mr. Ward. When Mr. Ward was notified that he was being fired after 18 years with KXTR, Heritage required him to sign a written agreement in order to receive commissions on

advertisements that he had already sold. In the agreement drafted by Heritage, Mr. Ward released Heritage from "any and all claims arising out of [his] employment with KXTR." Mr. Ward, despite his name, is not a lawyer. He did not fully understand this written agreement.

The evidence is uncontradicted that Mr. Ward was the best sales representative at KXTR, with the greatest sales production and the deepest penetration into the market.

Mr. Ward sued Heritage Media Corporation on a claim of age discrimination under the Age Discrimination in Employment Act of 1967. Heritage claimed that its decision for not retaining Mr. Ward was not made with a discriminatory motive. Mr. Ward claimed that Heritage's proffered reasons were not true, but rather pretext for discrimination. The United States District Court for the Western District of Missouri entered summary judgment against Mr. Ward. The United States Court of Appeals for the Eighth Circuit affirmed that judgment.

REASONS FOR GRANTING THE WRIT

The Supreme Court should take this case because it presents a conflict with a binding decision of this Court that deals with the same issues of law, *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). These cases both deal with an important problem: protection of capable older employees from age discrimination.

In *Reeves*, the Court resolved "a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case . . . combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." *Reeves* 120 S.Ct. at 2104. The United States Court of Appeals for the Fifth Circuit had required that the plaintiff show a prima facie case of discrimination and evidence that the explanation for the action was pretextual. The Court decided that test was erroneous. It held that evidence that would allow a finder of fact to reject an employer's reasons for the employment decision was enough for an inference of discrimination.

The decision of the United States Court of Appeals for the Eighth Circuit in this case is in conflict with *Reeves*. Having been decided prior to *Reeves, Ward* was decided under the same premise that the Fifth Circuit functioned from in *Reeves*. The Eighth Circuit applied a test for discrimination in the *Ward* case that required the following: (1) the plaintiff first had to show that he had a *prima facie* case of discrimination; (2) the defendant then had to show that there was a real, non-discriminatory reason for the employment decision; and (3) the burden then shifted back to the plaintiff to show that the defendant's proffered reasons were pretext for discrimination. The Eighth Circuit ruled against Mr. Ward because he had not shown evidence of pretext. (That was the correct application of the law at the time.) However, the Court's subsequent ruling in *Reeves* stated that the plaintiff does not need to show discriminatory motive on the part of the employer, but merely that its proffered reasons for the decision may be incorrect. This test is significantly different from the test used by the Eighth Circuit. 120 S.Ct. at 2101.

The *Reeves* decision clarified the law. One goal of the

Court in *Reeves* was to resolve a dispute among the courts of appeals, it is appropriate that Mr. Ward's case be reversed so that it can be re-decided in accordance with the law as stated in *Reeves*. It is not fair that Mr. Ward, after showing all the things required for a discrimination case under *Reeves*, should lose simply because the case was decided prior to *Reeves*.

It is important that like cases be decided in a like fashion. Consistency is an essential element of our judicial system. This cannot be achieved when similar cases dealing with the same federal questions are decided differently. The Court should issue its writ and immediately order the Eighth Circuit to re-decide this case in light of its *Reeves* decision.

Discrimination laws are in place to help people such as Mr. Ward who was the oldest man in the employee group in question. Mr. Ward was still very qualified and very capable of doing superior work. Heritage Media Corporation claimed that Mr. Ward was let go because he seemed unwilling to abide by rules and policies. Mr. Ward had been one of the top sales representatives at the company. He had always abided by company rules and policies

in the past, even after he was demoted in 1995. He was clearly not happy at the proposition of Heritage switching from a classical format, but his "disparaging remarks" were made in response to the request by the interviewers for him to describe what "drove him crazy about current management." Mr. Ward had not been happy about his 1995 demotion either, but he did nothing to raise concerns that his work would suffer because of it.

Another reason that Heritage gave for not retaining Mr. Ward was that there was concern that he would leave the company if it switched from a classical format. This concern was based on a *Kansas City Star* gossip column that did not express the sentiments of Mr. Ward at all, but rather the suspicions of the gossip columnist. Mr. Ward was 57 years old at the time of these events. It was not reasonable for Heritage to believe that he would seek new employment at that age. Mr. Ward had a good job and made a comfortable living. He had chosen a career path that he was satisfied with. There is no reason to believe that he would have been interested in leaving KXTR. He wanted to conclude his long and distinguished career with that station. Concern that he would

leave is not a credible reason for Mr. Ward not being retained.

Heritage also claimed that Mr. Ward was not retained because he lacked computer skills and seemed unwilling to learn. This was very weak. Mr. Ward is an educated and intelligent man. He could have easily learned the computerized format had he simply been given the opportunity. Heritage wrongly assumed that Mr. Ward, because of his age, could not learn how to use a computer. This reason for Heritage's firing Mr. Ward was false.

In *Reeves,* this Court reasoned "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." 120 S.Ct. at 2109. The evidence Mr. Ward provided was adequate to counter Heritage's explanation. His history as an employee at KXTR was excellent. Despite his "disparaging" interview comments, he remained a top employee and was very cooperative even in adverse circumstances at Heritage. He was quite productive after his demotion. There is no evidence that he would have been less productive after a switch of station format. The evidence is more than enough to raise questions about Heritage's reasons for its

decision. That is enough for a factfinder to deduce discrimination.

The Eighth Circuit dismissed Mr. Ward's claim because it "lack[ed] a jury issue as to pretext."

Pretext, however, need no longer be utterly proven before trial under *Reeves,* so Mr. Ward's case should be reversed and remanded.

CONCLUSION

In light of the Court's recent decision in *Reeves vs. Sanderson Plumbing Products, Inc.*, the petitioner prays that the judgment of the United States Court of Appeals for the Eight Circuit in *Ward v. Heritage Media, Inc.* be reversed and remanded. The Supreme Court should grant its writ of *certiorari* to the Eighth Circuit.

Respectfully Submitted,

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August 12, 2000

APPENDIX

Order and Judgment of April 14, 2000,
by the United States Court of
Appeals for the Eighth Circuit

Memorandum and Order of May 4, 1999
By the United States Court for the
Western District of Missouri

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No. 99-2540

Lawyer Ward,	*	
	*	
Appellant,	*	
	*	
vs.	*	Appeal from the United States
Heritage Media	*	District Court for the
Corporation, an	*	District of Western Missouri.
Iowa Corporation	*	
doing business as	*	[UNPUBLISHED]
KXTR FM,	*	
Appellee.	*	

Submitted: April 6, 2000
Filed: April 14, 2000

Before RICHARD S. ARNOLD, BOWMAN, AND BEAM, Circuit Judges.

PER CURIAM.

Lawyer Ward, a fifty-seven year old African-American male, appeals following the district court's [1] grant of summary judgment in favor of the defendant Heritage Media Corporation (Heritage) in his employment discrimination action. After de novo review of the record, see Winkle v. Southwestern Bell Tel. Co., 195 F.3d 418, 420 (8th Circuit. 1999) (summary judgment standard of review), we conclude the district court did not err in granting summary judgment to Heritage. We agree with the district court that Ward failed to create a trial issue on whether Heritage's proffered non-discriminatory reasons for his discharge were a pretext for age discrimination. Moreover, even assuming his related Title VII and MHRA race-discrimination claims are not barred by a settlement agreement he signed,[2] these claims suffer from the same deficiency--lack of a jury issue as to pretext--and thus were properly dismissed as well. See Kneibert v. Thomson Newspapers, Mich. Inc., 129 F.3d 444, 452 (8th Cir. 1997) (plaintiff can avoid summary judgment only

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[1]The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri. Accordingly, we affirm the judgment of the district court.

[2]The district court considered the merits of the age discrimination claim, because the release did not comply with the Older Workers Benefit Protection Act. See 29 U.S.C. § 626(f).

if evidence creates fact issue as to whether proffered reason was pretextual and creates reasonable inference that age was a determinative factor in employer's decision to discharge employee); Thomas v. Runyon, 108 F.3d 957, 959 (8th Cir. 1997) (race discrimination); Hennessey v. Good Earth Tools, Inc., 126 F.3d 1107. 1108 n.2 (8th Cir. 1997) (MHRA).

Finally, although Ward argues that the district court's order misstates his age as forty-seven when he is actually fifty-seven, Ward has not shown that the reference to his age was anything other than a clerical error, or that the error materially affected the court's analysis and conclusions.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATED DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LAWYER WARD,	)	
Plaintiff,	)	
vs.	)	**Case No. 98-0157-CV-W-3**
	)	
HERITAGE MEDIA	)	
CORPORATION,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pending is Defendant's Motion for Summary Judgment. (Doc. #26). Having concluded that there are no material facts in dispute and that the Defendant is entitled to judgment as a matter of law, the motion is granted.

I. BACKGROUND[1]

Plaintiff was hired as a sales manager for KXTR-FM, a classical radio station, in August 1979. He was hired by the station's owner, Robert Ingram. Plaintiff reported directly to Ingram until September 1995, at which time Bill Failing became the station's part owner and president. Failing became responsible for the station's daily operation.

[1]The parties have agreed that most of the facts in this case are undisputed; accordingly, citations to the record appear only with respect to those factual matters upon which the parties have not specifically agreed.

On November 6, 1995, Failing demoted Ward from sales manager to senior account manager, effectively stripping Ward of his management responsibility. At the same time, Failing appointed Doyle Peterson as the station's general manager. Henceforth, Plaintiff reported to Peterson.

In August 1996, Ingram entered into a contract to sell the station to Defendant; the sale was scheduled to close in January 1997. At the time the contract was executed, Defendant already owned two radio stations in Kansas City metropolitan area. Bill Newman was the President and general manager of Defendant's two Kansas City area stations.

After the agreement was executed, and before it was consummated, Defendant conducted a survey to determine the viability of a radio station with a classical format in Kansas City. The survey's purpose was to help Defendant decide whether to retain or change KXTR's format. The survey's results indicated that the classical format would be insufficiently popular (and therefore insufficiently profitable) to offset the debt Defendant would incur to buy the station. The survey also revealed that two other (non-classical) formats would be sufficiently popular to make the purchase economically viable. Based on these results, at some point in time between October and December 1996, Defendant decided to change the format by the following Spring. However, a new format was not selected at that time.

Until the new format was selected, Defendant decided that it would be prudent to combine the KXTR's sale staff with the sales staff from one of its other stations (KCIY). This is a common industry practice known as a "combo sales effort." The practice is employed to avoid duplicative effort and to keep salesmen and salewomen from both stations contacting the same clients. Defendant determined that a staff of ten was optimal; unfortunately, KCIY already had a staff of seven, and KXTR had a staff of five. Consequently, the decision was made to select three members of KXTR's sales staff and terminate the remaining two. In addition to Plaintiff, KXTR's sales staff consisted of Lisa Klinzman, Billie Reeves, Julie Throne, and Jon Verlin. Plaintiff was the only black member of the staff. At the time in question, Plaintiff was 47; Klinzman was 31, Reeves was 51, Throne was 26, and Verlin was 39.

Newman asked Defendant's sales managers - Sanford Cohen and Pam Malcy - to conduct separate interviews of each KXTR representative. Newman wanted input from his sales managers, but the final decision was to he his. Malcy Depo. at 51-52; Cohen Depo. at 91-96; Newman Affidavit, ¶ 6. Prior to the interviews, all three interviewers had seen an October 1, 1996 *Kansas City Star* that discussed Plaintiff's future and included quotes from the Plaintiff. The article includes a quote from Plaintiff indicating that he would have liked to become part-owner of the station but could not afford to do so and that he was extremely committed to a classical format.

The article also indicates that Plaintiff would leave the station if it did not retain its classical format, but this is expressed as the author's view and is not explicitly contained in any quote attributed to Plaintiff.

Prior to the interviews, Newman also met separately with both Failing and Peterson. Failing told Newman that when he came to the station "he felt it was a monopoly of sorts, and the station was not operating as it should. . . ." Newman Depo. at 71. Peterson related two incidents in which Plaintiff had violated the station's policies. Newman Depo. at 76-77.

Newman interviewed Plaintiff on January 8, 1997. In his notes – prepared during and immediately after the interview – Newman wrote the following:

> Talks as if he's the manager. Very opinionated about the operation. Feels he knows more about how the operation should [sic] than [the] owner and managers . . . He's an independent operator who won't conform to policy and procedures without a fight.
>
> * * *
>
> I would recommend [sic] against him because [he] would not conform to management structures because he's had his [illegible word] way for too many years and these habits are too tough to [sic] break.

Newman also indicated concerns that Ward had limited knowledge of computer-based data sources, which were commonly

used by Defendant's existing sales staff.

Malcy interviewed Plaintiff the following day. She wrote that Plaintiff was a "free spirit who is not used to reporting to management." Like Newman, she noted Plaintiff's lack of knowledge of computerized techniques as a shortcoming. During the interview, Plaintiff wanted to know if it would be possible for someone else to employ those techniques for him and expressed no interest in learning. Malcy Depo. at 85-86. Malcy also sensed Plaintiff was hostile toward management.

Cohen interviewed Plaintiff on January 14. In his notes, Cohen wrote that Plaintiff "spoke most of the time, asked questions, but did not necessarily listen for answers from me." He also opined that Plaintiff "would probably have a hard time working for someone who has policies and ways other than his. . . ."[2]

After all of the interviews were completed, Newman, Malcy and Cohen met to discuss the candidates. In addition to the issues already mentioned with regard to Plaintiff, all three interviewers noted Plaintiff's strong commitment to a classical format and expressed concerns that he would not stay once the format changed.

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[2]In his deposition, Plaintiff admitted that he criticized KXTR's management during the interviews and told the interviewers he thought the stations' sales staffs should remain separate. He also admitted to believing he knew more about marketing and selling than Ingram and the other managers at KXTR.

Ultimately, Newman decided that Klinzman, Reeves and Verlin would be retained for the combined sales staff, and that Plaintiff and Throne would release Defendant from "any and all claims arising out of [his] employment with KXTR, the termination of that employment, and the failure to be employed by [Defendant]. . . ." Although Plaintiff did not know precisely what claim he was releasing, he understood that the agreement called for him to release any claims he might have against Defendant. Plaintiff Depo. at 313-14.[3] There was no discussion about the agreement, nor did Plaintiff indicate to Newman that he did not understand the agreement. Plaintiff eventually signed the agreement, and Plaintiff has received the commissions described in the agreement.[4]

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[3]To provide further context, it should be noted that Plaintiff has a bachelors degree in communications and theology and a masters degree in management. He also attended (but apparently did not finish) law school, where he took at least one class on contracts.

[4]Plaintiff contends he was entitled to the commissions even if he did not sign the agreement, a fact which might demonstrate a failure of consideration. However, Plaintiff has presented no documents or other factual support for this contention, so it cannot be credited. drawn from the evidence. Matsuchita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-89 (1986); Tyler v. Harper, 744 f.2d 653, 655 (8th Cir. 1984), cert. denied, 470 U.S. 1057 (1985).

However a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the . . .pleadings, but . . .by affidavits or as otherwise provided in [Rule 56], must set forth specified facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

B. Analysis of Discrimination Claims

For purposes of its motion, Defendant concedes that Plaintiff can demonstrate a prima facie case of discrimination. Consequently, Defendant must come articulate a legitimate, non-discriminatory reason for its decision. If it is able to do so, the burden shifts back to Plaintiff to demonstrate that he proffered reason is really a pretext for discrimination. E.g., Kneibert v. Thomson Newspapers, Michigan Inc., 129 F.3d 444, 451-52 (8th Cir. 1997). In addition, because this case is essentially a reduction in force, the traditional analysis is altered slightly.

> During a reduction an employer's work force, however, the fact that the plaintiff's duties were assumed by a younger person is not in itself enough to establish a prima facie case. Otherwise every plaintiff in a protected . . . group would be allowed a trial simply because he was discharged during a reduction in force. Therefore, in a reduction-in force case, the plaintiff is required to come forward with additional evidence that age was a factor in his termination.

Bialas v. Greyhound Lines, Inc., 59 F.3d 759, 763 (8th Cir. 1995) (quotations and citations omitted).

Defendant has offered legitimate, non-discriminatory reasons for its decision not to select Plaintiff as one of the three members of KXTR's sales staff to be retained. All three interviewers senses an unwillingness on Plaintiff's part to abide by rules and policies. Based on the newspaper article and Plaintiff's statements during the interviews, there was a concern that Plaintiff would not stay when the station's format changed. In addition, Plaintiff's lack of experience with computerized techniques – and his lack of interest in learning – was a factor. All of these considerations are legitimate and non-discriminatory.

Plaintiff's efforts to demonstrate pretext fall short of the mark. Plaintiff insists that he was an effective and successful salesman. This point is not disputed; however, it is irrelevant given that Defendant did not rely on shortcomings in this area as grounds for not retaining him. Plaintiff contends that the interviewers also noted positive qualities about him, which is true; however, this does not demonstrate that the negative qualities were pretextual. In a situation when five qualified individuals are considered for three positions, it is not surprising that all the candidates will have positive (and negative) qualities. Plaintiff attempts to explain his lack of experience with computer research techniques by claiming that Ingram was unwilling to invest in the necessary equipment and training. Even if this is true, it does not contradict the fact that

Plaintiff lacked experience in this area. Plaintiff contends that he was not unwilling to learn, but also admits that he did not express this "lack of unwillingness" to the interviewers. Finally, Plaintiff contends that experience with computer research tools was not listed as a job requirement. This is true; however, this fact does not demonstrate pretext. Even though not listed as a requirement, it could be legitimately considered as a factor in evaluating otherwise equally qualified candidates. In addition, it appears that Plaintiff's reaction to the issue was just as much a concern as his lack of experience.

Even if Plaintiff has demonstrated that Defendant's proffered explanations are somehow false, his legal claims must fail because he has not demonstrated that the explanations were a pretext for *discrimination*. Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1332-38 (8th Cir. 1996); See also Ryther v. Kare 11, 108 F.3d 832, 837-38 & n.4 (8th Cir.) (en banc), cert. denied, 117 S.Ct. 2510 (1987).

C. Release

Plaintiff's claim under Title VII and the Missouri Human Rights Act also fail because he released them when he executed the agreement in January 1997. E.g., Warnebold v. Union Pac. R.R., 963 F.2d 222 (8th Cir. 1992); Pilan v. University of Minn., 710 F.2d 466 (8th Cir. 1983). Plaintiff read the agreement, understood that he

was releasing the claims in exchange for commissions, and executed the agreement. The fact that he did not consider the fact that discrimination claims might be included does not alter the fact that Plaintiff understood what he was doing.

Plaintiff contends that the release is invalid because it does not satisfy the requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 621 et seq. The Court agrees that the release does not satisfy the requirements of the Act; however, the Act only prescribes requirements for releasing claims under the ADEA; it does not apply to Title VII or the Missouri Human Rights Act.

III. CONCLUSION

The Court concludes that Plaintiff cannot prove his claims of race or age discrimination. The Court also concludes that Plaintiff released any claims he might have under Title VII and the Missouri Human Rights Act. Consequently, judgment is entered in Defendant's favor.

IT IS SO ORDERED.

ORTIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE 4/29/9

(2)

No. 00-583

Supreme Court, U.S.
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In The

Supreme Court of the United States

LAWYER WARD,

Petitioner,

v.

HERITAGE MEDIA CORPORATION,

Respondent.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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November 13, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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CORPORATE DISCLOSURE STATEMENT

Respondent Heritage Media Corporation was acquired by News Corporation, Inc. on August 23, 1997, as a wholly-owned subsidiary. As of March 1, 1998, Sinclair Broadcasting Corporation purchased the assets of Heritage Media Corporation and, thereupon, dissolved Heritage Media Corporation.

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STATUTES

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Heritage Media Corporation, an Iowa corporation that formerly conducted business as KXTR-FM, respectfully submits to the Court its brief in opposition ("Opposition") to Petitioner Lawyer Ward's petition for writ of *certiorari* to review the opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The order of the United States District Court for the Western District of Missouri granting defendant (Respondent) summary judgment on the grounds that plaintiff (Petitioner) failed to sufficiently support a case of age discrimination under the Age Discrimination in Employment Act is unreported and appears in the Appendix to the petition at pages A-5 through A-14.

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the district court's grant of summary judgment is unpublished and appears in the Appendix to the petition at pages A-2 through A-4.

The opinion of the United States Court of Appeals for the Eighth Circuit denying Petitioner's motion for recall of mandate in light of this Court's opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S. Ct. 2097 (2000), is unpublished and appears in the Appendix to this Opposition at page A-2.

STATUTORY PROVISIONS

Petitioner filed suit under the Age Discrimination in Employment Act of 1967, which is codified at 29 U.S.C. § 621 *et seq.* and prohibits employers from discriminating on the basis of age in employment decisions. The following statutory provisions are particularly relevant:

- 29 U.S.C. § 623(a)(1). Prohibition of Age Discrimination.
- 29 U.S.C. § 626(c). Recordkeeping, Investigation, and Enforcement.

The pertinent text of each section is included in the Appendix to this Opposition. The text of § 623(a)(1) is set forth at page A-3, and the text of § 626(c) is set forth at page A-4.

STATEMENT OF THE CASE

This is an age discrimination lawsuit brought by Petitioner pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (the "ADEA"). Petitioner was fifty-seven years old when Respondent decided to terminate his employment.

In August 1979, Petitioner was hired as sales manager of KXTR-FM 96.5 ("KXTR"), a classical music radio station based in Kansas City, Kansas. As sales manager, Petitioner's primary responsibilities were to generate revenue by selling advertisements to be broadcast on KXTR, as well as to hire and supervise sales representatives. Petitioner reported to the station's owner, Robert Ingram, until September 1995 when Bill Failing was named part-

owner and President of KXTR, with responsibility for the station's daily operations.

On November 6, 1995, Failing demoted Petitioner from sales manager to senior account manager, thus relieving Petitioner of all management responsibility. That same day, Failing appointed Doyle Peterson as General Manager of KXTR. Petitioner thereafter reported to Peterson.

In August 1996, Ingram contracted to sell KXTR to Respondent. The sale was scheduled to close in January 1997. At the time, Respondent owned two other Kansas City radio stations: KCFX-FM 101.1 ("KCFX") and KCIY-FM 106.5 ("KCIY"). Bill Newman was President and General Manager of Respondent's Kansas City-based stations.

While the sales contract was pending in the fall of 1996, Respondent conducted a survey on the viability of classical radio in the Kansas City market. The results indicated that two other musical formats offered Respondent much better long-term economic prospects. Respondent therefore decided to change the format of KXTR by the spring of 1997. No specific new format was chosen at that time.

Respondent decided that, until the new format was selected, KXTR could be most efficiently operated by combining its sales staff with that of KCIY and requiring all sales representatives to sell advertisements for both stations. This common industry practice is known as a "combo sales effort." Respondent determined the combo method would work well in this instance because KXTR already had many of the same advertisers as KCIY, which

broadcast a "smooth jazz" format. Without the combination, sales representatives from both Respondent-owned stations would call on the same advertising clients and, in essence, compete with one another.

Prior to closing the sale of KXTR, Respondent determined that a staff of ten sales representatives would be necessary for the combo sales effort. Respondent had an existing staff of seven KCIY sales representatives. KXTR had a staff of five, including Petitioner. Thus, Respondent decided to interview the KXTR sales representatives and select three to join the combo staff.

In January 1997, Newman and two of Respondent's experienced sales managers conducted separate interviews of each KXTR sales representative. Prior to the interviews, all three interviewers read an article in the *Kansas City Star* which quoted Petitioner's comments regarding Respondent's impending purchase of KXTR. In the article, Petitioner said that he wanted to become a "part-owner" of KXTR but could not afford to do so. Petitioner further stated that he was committed to KXTR's classical musical format. The *Kansas City Star* article stated that Petitioner would "follow" the classical music format to another station if Respondent changed to a new format.

Prior to the interviews, Newman met separately with Failing and Peterson to discuss KXTR's five sales representatives. Failing said Petitioner had been demoted because Petitioner operated the station as if it were his "monopoly." Failing also said Petitioner "was a management problem, that he didn't follow the rules, he made up his own rules." Peterson told Newman that Petitioner

resented his demotion and had refused to follow new management's policies and procedures. Peterson cited two specific examples where Petitioner had violated the station's sales policies.

All three interviewers conducted interviews with Petitioner between January 9, 1997 and January 14, 1997. All three noted serious concerns with Petitioner's conduct during the interviews. Each found Petitioner to be extremely opinionated and to present a significant management problem. Two of the three interviewers noted Petitioner's lack of familiarity or desire to learn state-of-the-art computer-aided sales practices.

When the interviews of all five KXTR sales representatives were completed, the three interviewers met to discuss the strengths and weaknesses of each candidate. They agreed that Petitioner and one other employee should not be retained on the combo sales staff. Newman made the final decision not to retain Petitioner based on the observations stated in the notes each interviewer made concerning Petitioner's interviews. Newman also considered the information provided by Petitioner's supervisors at KXTR, and Petitioner's comments in the *Kansas City Star* article. Newman notified Petitioner on January 24, 1997 that he would not be retained when Respondent finalized its purchase of KXTR.

Petitioner filed suit against Respondent on February 6, 1998, claiming age discrimination under the ADEA. Respondent asserted the defense that its decision to terminate Petitioner was based on non-discriminatory motives, as described above. Petitioner claimed that Respondent's proffered reasons were pretextual and that

the real reason he was terminated was his age. After discovery, Respondent moved for, and the district court granted, summary judgment in Respondent's favor, because Petitioner had failed to present evidence sufficient to support an inference that Respondent's justifications were pretextual. *See Ward v. Heritage Media Corp.*, No. 98-0157-CV-W-3 at *7-*9 (W.D. Mo. Apr. 21, 1999), attached to the petition at pages A5-A14. The United States Court of Appeals for the Eighth Circuit affirmed that judgment. *See Ward v. Heritage Media Corp.*, No. 99-2540 (8th Cir. Apr. 14, 2000), attached to the petition at pages A2-A4.

On July 3, 2000, Petitioner filed a motion for recall of mandate with the court of appeals, asking that court to set aside its April 14, 2000 opinion, in light of this Court's subsequent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S. Ct. 2097 (2000). The Eighth Circuit declined to grant Petitioner's motion, which was based on the same arguments Petitioner raises as grounds for this Court's grant of *certiorari*. *See Ward v. Heritage Media Corp.*, No. 99-2540 (8th Cir. July 12, 2000), attached hereto at A-1.

SUMMARY OF ARGUMENTS

Petitioner requests this Court grant *certiorari* to review the opinion of the Eighth Circuit affirming summary judgment in favor of Respondent, arguing that the court of appeals erred in applying the relevant law to Petitioner's claims in light of this Court's June 12, 2000 ruling in *Reeves v. Sanderson Plumbing Products, Inc.*, ___

U.S. ___, 120 S. Ct. 2097 (2000). Because *Reeves* did not change the law of the Eighth Circuit in any material respect, and certainly not as it applies to this case, the Court should not grant Petitioner's request for *certiorari*.

ARGUMENTS AGAINST GRANTING THE WRIT

In his petition, Petitioner asserts the Court "should take this case because it presents a conflict with a binding decision of this Court that deals with the same issues of law . . .." (Petition at 8.) However, Petitioner fails to squarely identify the conflict of which he complains. As demonstrated below, this is because the *Reeves* opinion, on which Petitioner relies, is entirely consistent with the Eighth Circuit law cited and applied by the lower courts in this case. Petitioner would face the same result under *Reeves* as he faced under Eighth Circuit precedent prior to *Reeves*.

Petitioner is certainly correct in observing that *Reeves* and this case share common issues of law. He is further correct in noting that the Court resolved in *Reeves* a conflict among the circuits as to the appropriate evidentiary standard on summary judgment in ADEA cases. Petitioner's error lies in failing to realize that the Eighth Circuit was already in line with this Court on the appropriate standard. For obvious reasons, Petitioner omits any discussion of Eighth Circuit case law prior to *Reeves*. Respondent submits this brief in order to demonstrate the absence of conflict between Eighth Circuit law, as applied in this case, and the *Reeves* decision. As the petition

states, "[c]onsistency is an essential element of our judicial system." (Petition at 10.) Consistency, however, is not in jeopardy here.

I. THE *REEVES* DECISION IS ENTIRELY CONSISTENT WITH THE PRE-EXISTING EIGHTH CIRCUIT LAW APPLIED IN THIS CASE.

In affirming the district court's grant of summary judgment in favor of Respondent on Petitioner's employment discrimination claims,[1] the Eighth Circuit cited *Kneibert v. Thomson Newspapers, Michigan, Inc.*, 129 F.3d 444, 452 (8th Cir. 1997), as support for the proposition that all of Petitioner's claims were properly dismissed because they "suffer from the same deficiency – lack of a jury issue as to pretext." *Ward v. Heritage Media Corp.*, No. 99-2540, at *2 (8th Cir. Apr. 14, 2000). In *Kneibert*, the court noted that the decision of *Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996), concerning the evidence necessary to withstand a summary judgment motion, had been adopted by the Eighth Circuit *en banc* in *Ryther v. Kare 11*, 108 F.3d 832, 837-38, 848 (8th Cir. 1997) (*en banc*).

As held in *Rothmeier*, adopted by *Ryther*, and quoted in *Kneibert*,

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[1] Summary judgment was also granted and affirmed on Petitioner's Title VII and state law race discrimination claims, for the independent reason that they were "barred by a Settlement Agreement he signed." Petitioner raises in his petition no challenge to the grant of summary judgment for this reason, leaving only his ADEA claim at issue here.

> the rule in this Circuit is that an age discrimination plaintiff can avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision. The second part of this test sometimes may be satisfied without additional evidence where the overall strength of the *prima facie* case and the evidence of pretext "suffice[s] to show intentional discrimination." The focus, however, always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of the plaintiff's age.

Rothmeier, 85 F.3d 1328, 1336-37.

The *Kneibert* decision further examined *Ryther*'s discussion of the *Rothmeier* rule, noting that *Ryther* more fully explained:

> In sum, when the employer produces a nondiscriminatory reason for its actions, the *prima facie* case no longer creates a legal presumption of unlawful discrimination. The elements of the *prima facie* case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff. This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent

> with a reasonable inference of age discrimination.

Kneibert, 129 F.3d at 454, n.6 (quoting *Ryther*, 108 F.3d at 837). From the *Rothmeier* and *Ryther* principles, *Kneibert* concluded that the plaintiff "must set forth sufficient evidence of pretext so that a trier of fact could reasonably infer that age discrimination motivated the adverse employment action." *Id.*

The Eighth Circuit's holdings in *Kneibert*, *Ryther*, and *Rothmeier* are entirely consistent with this Court's decision in *Reeves v. Sanderson Plumbing Products*. In *Reeves*, the Fifth Circuit Court of Appeals had proceeded from "the premise that a plaintiff must *always* introduce additional, independent evidence of discrimination," *in addition to* the evidence supporting the plaintiff's *prima facie* case and evidence of pretext, in order to permit a finding of liability. *Reeves*, 120 S. Ct. at 2109 (emphasis added). This Court found the Fifth Circuit's standard to be erroneous. *Id.*

Rather, the Court held that

> a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.
>
> This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational fact finder could conclude that

> the action was discriminatory. For instance an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. (citations omitted).

Further, the Court stated that "the ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Id.* at 2111. "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.* at 2109.

Thus, the holding of *Reeves* that proof of a *prima facie* case and evidence of pretext may in some circumstances suffice to withstand an employer's motion for judgment as a matter of law is entirely consistent with the Eighth Circuit's holdings in *Rothmeier* and *Ryther* as adopted in *Kneibert* that "the elements of the *prima facie* case . . . and evidence of pretext . . . may permit the jury to find for the plaintiff." *Ryther*, 108 F.3d at 837. Likewise, the Court's conclusion in *Reeves* that mere evidence of pretext will not always be sufficient to sustain a jury's finding of liability, *Reeves*, 120 S. Ct. at 2109, is entirely consistent with the Eighth Circuit's prior holding "that evidence of

pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination." *Ryther*, 108 F.3d at 837.

Because the decision of the Supreme Court in *Reeves v. Sanderson Plumbing Products* does not materially change the law of the Eighth Circuit, Petitioner's request for writ of *certiorari* should be denied.

II. THE STANDARD FOR ANALYZING PRETEXT EVIDENCE IS MOOT IN ANY EVENT, BECAUSE THERE WAS NO EVIDENCE OF PRETEXT.

Even assuming *Reeves* altered the standard for analyzing whether some evidence of pretext may be sufficient to survive a motion for summary judgment, the point is moot because the district court concluded and the Eighth Circuit affirmed that Petitioner's evidence failed to "demonstrate pretext" of any sort.

Pages six and seven of the district court's decision analyzed Petitioner's discrimination claim under the standards of *Kneibert* and prior Eighth Circuit holdings. *See Ward v. Heritage Media Corp.*, No. 98-0157-CV-W-3, at *7-*9 (W.D. Mo. Apr. 21, 1999). After noting that Petitioner's *prima facie* case was not in dispute for the purposes of Respondent's motion for summary judgment, the district court held that Respondent had offered legitimate nondiscriminatory reasons for its decision not to retain Petitioner on its sales staff. *See id.* The articulated reasons included a belief by three interviewers that Petitioner would be unwilling to abide by rules and policies, a concern based on a newspaper article and Petitioner's statements in interviews that he would not stay at the station if the format changed from classical music, and a

concern that Petitioner lacked experience with computerized techniques and lacked interest in learning them. *See id.*

The district court analyzed Petitioner's arguments regarding each of these legitimate nondiscriminatory reasons, and explained why Petitioner's arguments failed to suggest that Respondent's stated reasons were untrue or pretextual in any way. *See id.* In addition, the court held that "even if Plaintiff has demonstrated the defendant's proffered explanations are somehow false, his legal claims must fail because he has not demonstrated that the explanations were a pretext for discrimination." *Id.* (citing *Rothmeier*, 85 F.3d at 1332-38; *Ryther*, 108 F.3d at 837-38 & n.4). The analysis of the district court was affirmed by the Eighth Circuit in its *per curiam* decision stating that all of Petitioner's claims "suffer from the same deficiency – lack of a jury issue as to pretext."

Because the district court concluded and the Eighth Circuit affirmed that Petitioner's evidence did nothing to cast doubt on Respondent's legitimate, nondiscriminatory reasons for not selecting him, Petitioner's arguments regarding the implications of *Reeves* are merely academic. *Reeves* addressed a situation in which a plaintiff had proffered *some* evidence suggesting that a defendant's stated reasons for its actions were pretextual. Here, Petitioner's evidence does not even rise to that level, as both courts below concluded there was *no* evidence of pretext.

As any impact of the *Reeves* decision on the law of the Eighth Circuit is irrelevant as applied here, Petitioner's request for writ of *certiorari* should be denied.

CONCLUSION

It is clear that the evidentiary standard applied below is entirely consistent with this Court's decision in *Reeves* and that, in any event, Petitioner could fare no better under *Reeves* because he failed to demonstrate any evidence of pretext. In light of the foregoing, the Court has no basis for, and should have no interest in, granting Petitioner's request for writ of *certiorari* in this case.

Respectfully submitted,

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November 13, 2000

APPENDIX

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July 12, 2000 Order of the United States Court of Appeals for the Eighth Circuit denying Petitioner's motion for recall of mandate A-1

29 U.S.C. § 623(a)(1) A-2

29 U.S.C. § 626(c) A-3

UNITED STATES COURT OF APPEALS

No. 99-2540WMKC

Lawyer Ward, Appellant, vs. Heritage Media Corporation, an Iowa Corporation, doing business as KXTR FM, Appellee.	*	Appeal from the United States District Court for the Western District of Missouri

Appellant's motion to recall the mandate has been considered by the court and is denied.

(5120-010199)

July 12, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

29 U.S.C. § 623(a)(1). Prohibition of Age Discrimination.

It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 626(c). Recordkeeping, Investigation, and Enforcement.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.